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UNITED STATES DISTRICT COURT
FOR THE
NORTHERN MARIANA ISLANDS

KENNETH COUTURE,

CIVIL ACTION NO. CV05-0024

Plaintiff,

v.

AMERICAN OVERSEAS MARINE
CORPORATION and GENERAL
DYNAMICS CORPORATION,

Defendants.

PLAINTIFF'S OPPOSITION TO
DEFENDANTS' MOTION FOR
SUMMARY JUDGMENT

Date: March 15, 2007

Time: 10:00 a.m.

Judge: Alex R. Munson

INTRODUCTION

Defendants have moved for summary judgment, seeking dismissal of plaintiff's action on the grounds that the Public Vessels Act ("PVA") and the Suits In Admiralty Act ("SAA") prohibit

1 plaintiff from suing the vessel's owner and his employer and limit his remedy to an action against
2 the United States.

3 Defendants' motion is a shocking and unprincipled attempt to intimidate plaintiff into a
4 settlement. Shocking that, after two years of litigation in which the defendants admitted
5 jurisdiction, supplied the name of the insurance company responsible for paying plaintiff's claim,
6 obtained a four month continuance of the trial based on the necessity of taking depositions on the
7 east coast of the United States, depositions in which the defendants' employees testified that
8 defendants have a claims department and claims manager who is specifically charged with
9 handling personal injury claims of defendants' employees on twenty-seven (27) different ships
10 owned by defendants, the defendants now tell the court that it is not the responsible party, that the
11 United States is, and that plaintiff's claim should be dismissed even though the statute of
12 limitations against the United States has run.

15 Equally shocking, as the motion itself, is the failure of the defendants in any of the
16 moving papers, to offer a single word of explanation for its failure to raise this issue until three
17 months after the original trial date. Why was so much time and money of the parties, not to
18 mention the court, expended litigating against the defendants if the United States is the only party
19 that can be sued?

21 Are giant defense contractors with a long history of chartering vessels to the United
22 States, insured under a P&I policy and advised by a law firm expert in admiralty law, so ignorant
23 of the law that they were not aware of the PVA and the SAA or so devious and dissembling that
24 they led plaintiff and the court to believe that they, in fact, were the proper parties, laying in the
25 weeds until after the statute of limitations against the United States had passed.

26 In fact, neither is the case, the defendants are well aware of the law and well aware that
27 under the law, they, and not the United States, are the parties responsible for personal injuries to
28

1 its seamen employees aboard ships that they own and time charter to the government. The
2 motion is simply an attempt to obtain a better position for settlement by intimidating the plaintiff
3 with the threat that his claim could be dismissed.

4 As the court will see, the motion is totally bogus and should be summarily denied with
5 sanctions assessed.

7

8 SUMMARY OF ARGUMENT

9 The law is clear that, to be subject to the PVA, the vessel must either be owned by the
10 United States or leased to it, pursuant to a bareboat or demise charter.

11 The written charter agreement is entitled, "Time Charter" and at Article 35, states
12 specifically that it is not a "demise". The law of the Ninth Circuit is that normally time charterers
13 are not responsible for personal injuries to crewmen on vessels that they charter, and, therefore,
14 the SAA is not applicable. Defendants have failed to cite a single case in which a court has
15 granted the relief they are requesting on similar facts.

16
17 Despite defendants' astonishing request that the court dismiss this case, pursuant to PVA
18 and the SAA three months after the original trial date, it has not cited a single case in which a
19 privately owned vessel, time chartered to the United States government, was subject to the
20 exclusivity provision of the PVA or the SAA. In fact, two cases, which they cited, *Williams v.*
21 *Central Gulf Lines*, 874 F.2d 1058 (5th Cir. 1989); and *Alexander v. United States*, 63 F.3d 820
22 (9th Cir. 1995), hold the opposite and provide the court with the definitive answer to this issue, as
23 will be explained later in this memorandum.

ARGUMENT

A. PUBLIC VESSEL IS ONE OWNED OR UNDER DEMISE CHARTER TO THE UNITED STATES.

Stubblefield v. Vickens Towing Co., 674 F.Supp. 566 (N.D. Miss. 1987), cited by defendants, gives us a definition of “public vessel”, specifically finding that the vessel in the case was not a public vessel and, therefore, not subject to the PVA.

M/V TERRI IS NOT A PUBLIC VESSEL

A “public vessel” is a vessel owned or under demise charter to the United States and used by the government exclusively for a public purpose. Blanco, 775 F.2d at 57-60. See also Denahey v. Isbrandtsen Co., Inc. 80 F.Supp. 180 (S.D.N.Y. 1948). The M/V TERRI was owned and operated by Vickers Towing and under a time charter to the Corps of Engineers. Clearly, the M/V TERRI was not a public vessel.

Id. p. 567.

The written agreement by which the United States chartered the M/V Lummus is entitled, "Time Charter". It specifically states that it is not a demise.

ARTICLE 35. CHARTER NOT A DEMISE

Nothing herein contained shall be construed as creating a demise of the Vessel to the Charterer; the Contractor shall at all times retain complete and exclusive possession and control of the Vessel and its navigation.

(Fitzgerald Decl. Exhibit “A”).

Defendants concede in its memo that the M/V Lummus, at the time of the accident, was not owned by the government. (Defts' Memo. p. 9). At the time of the accident, the M/V Lummus was privately owned and time chartered to U.S. (Defts' Memo. p. 4). The charter specifically says at Article 35 that, it is not a "demise". Under these facts and the definition above, the M/V Lummus is clearly not a public vessel.

1 It is inexplicable that defendants continue to attempt to persuade the court that the M/V
2 Lummus was subject to the PVA.
3

4 B. EVERY CASE CITED BY DEFENDANTS TO SUPPORT THE APPLICABILITY OF
5 THE PVA INVOLVES A VESSEL OWNED BY OR DEMISE (BAREBOAT)
6 CHARTERED TO THE UNITED STATES.
7

8 At pages 8 and 9, defendants cite a series of cases to support its claim that the PVA is
9 applicable, but unlike the M/V Lummus, which was privately owned, every case they cite
10 involves a vessel that is either owned by the United States, or leased subject to a demise or
11 bareboat charter.
12

13 *Dearborn v. Mar Ship Operations, Inc.*, 113 F.3d 995 (9th Cir. 1997) involved a private
14 entity under contract to operate a vessel owned by the Navy, the USNS Kane.
15

16 At the time of the injury, the Kane was owned by the United
17 States.
18

19 *Id.* 997.
20

21 In *Petition of the United States*, 367 F.2d 505, the vessel in question was owned by the
22 United States, a United States Naval Ship, the USNS Mission San Francisco. *Id.* 508. *Cruz v.*
23 *Marine Transport Line, Inc.*, 634 F.Supp. 107 (D.N.J.) involved a vessel that, while not owned by
24 the United States, was under a bareboat charter to it and designated as a United States Naval Ship,
25 the USNS Sealift Pacific. *Id.* 110.
26

27 All the vessels involved in the case of *Santos v. RCA Serv. Co.*, 603 F.Supp. 943, were
28 vessels owned by the United States.
29

30 The United States Navy owns all but one of the support vessels
31 operated by RCA.
32

33 *Id.* 946.
34

1 *United States v. United Continental Tuna Corp.*, 425 U.S. 164, 167 n1 (1976), involved a
2 naval destroyer, unquestionably a vessel owned by the United States. To the same effect, is
3 *Taghadonni v. United States*, 401 F.3d 1080, which concerned a U.S. Coast Guard cutter, without
4 doubt owned by the United States.
5

6 In *George W.Rogers Const. Co. v. United States*, 118 F.Supp. 927, the vessel in question,
7 the Cayuse was “owned absolutely by the United States through the Maritime Commission.” *Id.*
8 935. It was the same situation in *Roeper v. United States*, 85 F.Supp. 927 (S.D.N.Y. 1954),
9 which involved a ship known as the SS Carl Schurz.
10

11 The United States is a sovereign power and was and is the owner
12 and operator of the SS Carl Schurz.
13

14 Findings of Fact (2).

15 Defendants have simply ignored the fact that, in every one of these cases, the vessel in
16 question was either owned or under a demise or bareboat charter and that the M/V Lummus fits
17 into neither of those categories because it was owned by a private entity and operating under a
18 time charter, which gave complete and exclusive possession and control of the vessel and its
navigation to the defendants. (Fitzgerald Decl. Exhibit “A”).
19

20 None of these cases support the argument that the M/V Lummus was a public vessel at the
time of plaintiff’s accident.
21

22 C. SUIT IN ADMIRALTY ACT DOES NOT APPLY TO VESSELS TIME CHARTERED
23 TO UNITED STATES.
24

25 1. Authority Relied On By Defendants Has Been Vacated.
26

27 Defendants cites *Stubblefield v. Vickers, supra*, to the effect that:
28

Seamen’s personal injury suits arising from operation of privately owned vessels time chartered to the United States must be brought exclusively against the United States under the SAA.
6

1 (Defendants' Memo. p.7).

2 Defendants failed to inform the court that the *Stubblefield* decision was vacated
3 and withdrawn as a result of the Fifth Circuit Court of Appeals in *Williams v. Central Gulf Lines*,
4 874 F.2d 1058 (5th Cir. 1989).

5 ORDER

6 SEENTER, Chief Judge.

7 The Court having been advised of the decision of the Fifth Circuit
8 Court of Appeals in *Williams v. Central Gulf Lines*, 874 F.2d 1058
9 (1989), and having reconsidered its Opinion filed December 2,
10 1987 in the instant cause HEREBY ORDERS that this Court's
11 December 2, 1987 Opinion and Order rendering summary
12 judgment in favor of Vickers Towing Company are vacated and
13 withdrawn.

14 SO DONE.

15 N.D. Miss., 1989. *Stubblefield v. Vickers Towing Co.*, 719 F.Supp. 1337.

16 The *Williams* case is factually identical to the case before the court and held that the
17 private owner of a vessel time chartered to the U.S. was the proper party to sue for a seaman's
18 personal injury and that SAA did not apply. The *Williams* decision was cited with approval by
19 the Ninth Circuit in *Alexander v. U.S.*, 63 F.3d 820, 822 (9th Cir. 1995), which also held that the
vessel's owner was the proper party and that the SAA did not apply.

20 In *Williams, supra*, an action for death of a seaman against his private maritime employer,
21 involving vessel, which was time chartered to United States, the court held:

22 This Circuit's rule is that a time charterer, 'who has no control
23 over the vessel, assumes no liability for negligence of the crew or
24 unseaworthiness of the vessel absent a showing that the parties to
25 the charter intended otherwise' (citations omitted). The term
26 "control" as used by this court in formulating this general rule
refers to operational control of the vessel not ultimate control of its
destination or cargoes.

27 Section 35 of the time charter for the M/V Lummus (see Fitzgerald Decl. Exhibit "A"), is
28 virtually identical to that found in this case.

1 *Id* 1061.

2 “...this circuit seems reluctant to find any shift of operational
3 responsibility for personal injuries to the time charterer absent
4 clear language to that effect.” (citations omitted). The charter
5 contains no clear language whereby the United States assumes
6 responsibility for the vessel’s operations or for personal injuries
7 caused by negligence of the crew. We therefore hold that
8 operational control did not shift from Central Gulf to the United
9 States and that, given the specific facts at hand, the appellant
10 would have been unable to state a claim against the United States
11 as time charterer.

12 *Id* 1064.

13 Likewise, the charter for the M/V Lummus contains no clear language, whereby the
14 United States assumes responsibility for the vessel’s operations or personal injuries.

15 This case is factually identical and the holding is obviously against the defendants. It was
16 because of this case that the court withdrew its order in *Stubblefield*.

17 Defendants also cite *Alexander v. United States*, 63 F.3d 820, which lends absolutely no
18 support to its position, but rather, confirms the rule established in *Williams* as the law of the Ninth
19 Circuit.

20 The charter document in this case creates a time charter. Under
21 traditional admiralty principles an injured seaman cannot sue a
22 time charterer unless the seaman can show either the time charterer
23 had enough control of the vessel to render it the owner *pro hac*
24 *vice* (citation omitted) or time charterer was actively negligent.

25 *Id.* 823.

26 Defendants have submitted the self-serving declaration of Thom Merrill to support its
27 contention that the U.S. controlled the M/V Lummus, akin to a similar argument made and
28 rejected in *Alexander*.

29 Alexander also relies on the fact that the government directed the
30 movement and cargo operations of Santa Adela. A time charterer,
31 however, always directs the movements and cargo operations of
32 the ship (citations omitted). The time charterer’s exercise of these

1 rights is not inconsistent with the vessel owner's control of the
2 vessel and its crew.

3 *Id.* 823, 824.

4 Defendants also claim that the United States may have been negligent because of the
5 actions of a medical officer who treated the plaintiff after his injury. (Defts' Memo. pp.11, 12).
6 The *Alexander* court rejected a similar claim and his court should as well. (*Id.* 824). The primary
7 cause of action here involved negligence and unseaworthiness, in which the United States was
8 completely uninvolved. Furthermore, responsibility for the safety of the crew resides with the
9 captain, and it was incumbent upon him to insure that plaintiff received appropriate medical care,
10 which in this case, would have been to have plaintiff taken ashore in Japan for an x-ray, which
11 was possible at the time, rather than having him treated on the ship. The plaintiff, in this case,
12 would not have been able to bring an action against the time charterer because of failings of the
13 vessel's owner, and, therefore, it would not be able to bring this cause of action against the
14 government. The SAA is, therefore, inapplicable.

15 We are unable to discern any applicability of *Western Tankers Corp. v. United States*, 387
16 F.Supp. 487. (Defts' Memo. p.10). The final case cited by defendants, *Favorite v. Marine*
17 *Personnel and Commissioning, Inc.*, 955 F.2d 382 (5th Cir. 1992), does not support defendants'
18 position, but completely destroys their argument.

19 In *Favorite*, the court held that PVA was applicable because the vessel was leased to the
20 United States pursuant to a bareboat charter and, therefore, suit against the United States was the
21 exclusive remedy. The court found that the vessel was a public vessel.

22 The term "public vessel" in the PVA [includes] a vessel under
23 bareboat charter to the United States and used solely in public
24 services.

25 *Id.* 387.

26 This court found the appellant's reliance on *Williams* misplaced because:

27 In *Williams*, this court held that the exclusivity provision did not
28 bar a suit against a private employer by a seaman injured aboard a
vessel time chartered to the United States. The court found that

1 under the time charter, the vessel was not a public vessel because
2 the United States was not responsible for the vessel's operations or
3 for personal injuries caused by the crew's negligence. The United
4 States only controlled the vessel's destination and cargo and did
5 not assume operational control.

6 *Id.* 387.

7 CONCLUSION

8 The M/V Lummus was not owned by the United States and it was not operated under a
9 bareboat charter by the United States. Therefore, the PVA is inapplicable.

10 Because the rule of the Ninth Circuit is that time charterers are not responsible for
11 personal injuries on vessels that are time chartered, the SAA does not apply. Therefore, the
12 plaintiff's employer, and not the United States, is the proper defendant in this case. Defendants'
13 failure to produce a single case on point factually mandates that defendants' motion for summary
14 judgment be denied.

15 DATED this 1st day of March, 2007.

16 LAW OFFICE OF WILLIAM M. FITZGERALD

17 
18 By: WILLIAM M. FITZGERALD, ESQ.
19 Attorney for plaintiff